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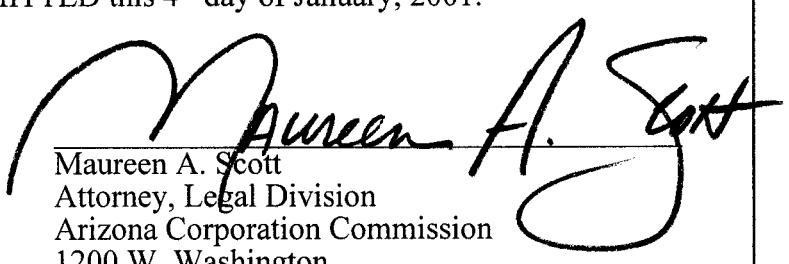
IN THE MATTER OF U S WEST  
COMMUNICATIONS, INC.'S  
COMPLIANCE WITH SECTION 271  
OF THE TELECOMMUNICATIONS  
ACT OF 1996

Docket No. T-00000A-97-0238

NOTICE OF FILING

The Arizona Corporation Commission Staff, by its undersigned attorneys, hereby files its Draft Findings of Fact and Conclusions of Law relating to the Checklist Item No. 3 – Poles, Ducts, Conduit and Rights-of-Way. Staff requests a waiver of the 20 day time period specified for completion of Draft Reports, since the parties' negotiations extended many months beyond the date of the last workshop on Checklist Item 3 and Staff had an unusually heavy workload in the last few months with the Qwest Sale of Exchanges and Rate Case Dockets during this same time period.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January, 2001.

  
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Original and ten copies of the foregoing  
were filed this 4<sup>th</sup> day of January, 2001 with:

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**CERTIFICATE OF SERVICE**

Copies of the foregoing "Notice of Filing" were mailed this 4<sup>th</sup> day of January,

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**IN THE MATTER OF U S WEST COMMUNICATION, INC.'S  
SECTION 271 APPLICATION**

**ACC Docket No. T-00000A-97-0238**

**REPORT ON US WEST'S COMPLIANCE**

**With**

**CHECKLIST ITEM: NO. 3 -      POLES, DUCTS, CONDUIT  
AND RIGHTS-OF-WAY**

**JANUARY 4, 2000**

## **I. FINDINGS OF FACT**

### **A. PROCEDURAL HISTORY**

1. The first Workshop on Checklist Item 3 was held on February 17, 2000. U S WEST relied upon its initial testimony filed in March, 1999. AT&T and MCI WorldCom filed additional comments on February 8, 2000. Cox filed additional comments on February 10, 2000. U S WEST<sup>1</sup> responded on February 16, 2000. Parties appearing at the Workshops included U S WEST, AT&T, MCI WorldCom, Sprint, Cox e-spire, and the Residential Utility Consumer Office ("RUCO").

2. On March 7, 2000, an additional Workshop on Checklist Items 3, 7 and 10 was held. Comments were filed by AT&T on March 2, 2000 with Reply comments filed by U S WEST March 6, 2000.

3. The Parties resolved many issues at the two Workshops held on January 25, 2000 and March 7, 2000. Outstanding issues from the March 7, 2000 Workshop included a commitment by U S WEST to make amendments to its SGAT and modifications to its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. U S WEST agreed to supply the amended language to the parties to review. On April 21, 2000, MCI WorldCom filed Comments stating that it had reached agreement with U S WEST regarding the language contained in the SGAT. However, MCI WorldCom stated that it continued to have concerns regarding U S WEST's Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. On June 12, 2000, U S WEST submitted additional revisions to its SGAT and Exhibits A and D thereto including its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions. AT&T, in a letter dated June 15, 2000, stated that it did not object to the revisions to documentation negotiated between MCIWorldCom and U S WEST.

### **B. DISCUSSION**

#### **1. Checklist Item No. 3**

##### **a. FCC Requirements**

4. Section 271(c)(2)(B)(iii) of the Telecommunications Act of 1996 requires a 271 applicant to provide or offer to provide: "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

5. In the *Local Competition First Report and Order*, the FCC interpreted Section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits,

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<sup>1</sup> As of the date of this Report, U S WEST has merged with Qwest Corporation, which merger was approved by the Arizona Commission on June 30, 2000.

and rights-of-way for competing providers of telecommunications services in accordance with the requirements of Section 224.

6. Section 224(f)(1) states that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”

7. Notwithstanding this requirement, Section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, “where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”

8. Section 224(b)(1) authorizes the FCC to regulate the rates, terms, and conditions for pole attachments to ensure that such rates, terms and conditions are reasonable. Under Section 224(c)(1) the FCC’s jurisdiction does not extend to rates terms or conditions or access to poles, ducts, conduits and rights-of-way in any case where such matters are regulated by a State.

9. As of 1992, nineteen States had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.”<sup>2</sup>

10. Pursuant to Section 224(e)(1), the FCC was required to prescribe regulations within 2 years of the date of enactment of the 1996 Act, to implement the provisions of the Act dealing with charges for pole attachments used by telecommunications carriers to provide telecommunications services to ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.

11. The FCC interpreted the requirements of Section 224 governing rates, terms, and conditions for telecommunications carriers’ attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.<sup>3</sup>

12. In its *Local Competition First Report and Order*<sup>4</sup>, the FCC established five rules of general applicability concerning poles, ducts, conduits, and rights-of-way. First, in evaluating a request for access a utility may continue to rely on such codes as the National Electrical Safety Code (“NESC”) to prescribe standards with respect to capacity, safety, reliability, and general engineering principles. Second, Federal requirements, such as those imposed by the Federal Energy Regulatory Commission (“FERC”) and the Occupational Safety and Health Administration (“OSHA”) will continue to apply to

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<sup>2</sup> These States included Alaska, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Jersey, New York, Ohio, Oregon, Utah, Vermont, and Washington.

<sup>3</sup> *In the Matter of Implementation of Section 703(E) of the Telecommunications act of 1996*, 13 FCC Rcd. 6777 (rel. February 6, 1998) (“Pole Attachment Telecommunications Rate Order”).

<sup>4</sup> *Implementation of the Local Competition Provision in the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996), *vacated in part and aff’d in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *overruled in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

utilities to the extent such requirements affect requests for attachments to utility facilities under Section 224(f)(1). Third, the FCC considers State and local requirements affecting pole attachments. Fourth, where access is mandated, the rates, terms, and conditions of access must be uniformly applied to all telecommunications carriers and cable operators that have or seek access. Except as specifically provided, the utility must charge all parties an attachment rate that does not exceed the maximum amount permitted by the FCC formula. Fifth, a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services. *Local Competition First Report and Order* at paras. 1151-1153; 1156 and 1157.

13. The FCC in the *BellSouth Louisiana II Order*<sup>5</sup> specified four elements for establishing a prima facie case for Checklist Item 3:

- a. Evaluating facility requests pursuant to Section 224 of the Act and the *Local Competition First Report and Order*,
- b. Granting competitors nondiscriminatory access to information or facilities availability,
- c. Permitting competitors to use non-[RBOC] workers, and
- d. Compliance with State and Federal rates.

Id. at para. 174.

## b. Background

14. Poles are used to support cable, equipment, facilities, apparatuses or appurtenances that are used or useful in providing telecommunications services. USW-18, at p. 39. U S WEST provides attachments to poles that are owned in full or in part by U S WEST. Id. at p. 39.

15. Ducts or conduits are enclosed reinforced passages capable of housing communications cables. USW-18 at p. 39. Some ducts or conduits controlled by U S WEST may be in buildings owned by third parties. Id. at p. 39. Access to ducts or conduit is made available to other carriers, to the extent permissible, under existing rights-of-way permits and easements. USW-18 at p. 39. U S WEST permits an attaching party to interconnect its ducts in the manholes of U S WEST. USW-18 at p. 39. This allows the attaching party to conveniently enter and exit U S WEST's conduit system. USW-18, at p. 39.

16. All of U S WEST's poles, conduits, ducts, and rights-of-way are located either in public rights-of-way, such as streets, alleys, bridges or dedicated utility

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<sup>5</sup> *Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended to Provide In-Region InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271 (rel. Oct. 13, 1998) ("*BellSouth Second Louisiana Order*").



easements, or on property owned by private or public entities. USW-18, p. 39. U S WEST's right to have its poles and conduit systems on public rights-of-way is subject to state and local ordinances and laws, zoning regulations, or other permissions or authorities granted by government agencies. USW-18, pp. 39-40.

17. On private or public property (other than public rights-of-way), U S WEST obtains an easement or license from the owner to place and maintain its poles and conduit systems. USW-18, p. 40. At times, U S WEST may have arrangements for poles, ducts or conduits on private property without any right (or an incomplete) to grant access to third parties. *Id.* at p. 40.

18. Sometimes, easements or licenses from adjoining property owners are necessary even to occupy public rights-of-way. USW-18 at p. 40.

19. U S WEST shares use of poles and conduit systems and easements with an electric utility under the terms of joint use or joint ownership agreements. *Id.*

20. U S WEST's ability to maintain its poles and conduit systems is subject to the terms, conditions and limitations of these various laws and agreements, and so U S WEST must condition an attaching party's access to its poles and conduit systems on those same terms and conditions. *Id.*

### **c. U S WEST Position**

21. On March 25, 1999, U S WEST witness Michael J. Weidenbach provided Direct Testimony indicating that U S WEST satisfied Section 271(c)(2)(iii) of the Act. USW-18, at p. 20. According to Mr. Weidenbach's testimony, U S WEST has a concrete and specific legal obligation to provide access to poles, ducts and conduits in the proposed U S WEST SGAT and the various interconnection agreements between U S WEST and CLECs in Arizona. USW-18, p. 3.

22. For years, U S WEST and other telecommunications carriers have entered into broad joint-use agreements for the use of poles, ducts, conduits, and rights-of-way, pursuant to the 1978 Pole Attachment Act. USW-18, p. 3. As a result, U S WEST is highly experienced at providing access to poles, conduits and rights-of-way consistent with Section 224 of the Telecommunications Act of 1996. *Id.*

23. U S WEST has developed detailed processes to support the ordering of access to poles, ducts, conduits and rights-of-way for CLECs. See, USW-18, Exs. MJW-02 to MJW-C3.

24. When a CLEC first inquires about access to poles, ducts, conduits and rights-of-way, the CLEC completes the "General Information" pages of the U S WEST access request form, per Section 10.8.4.1 of the SGAT. USW-18, p. 41. The information requested includes a drawing of the proposed route and a general description of the facility to be placed. USW-18, p. 41. Upon completion of the records verification

process, a quote is prepared for the field verification work and submitted to the CLEC. The records verification work and quote for field verification by U S WEST engineering division is completed within 10 business days of inquiry for standard requests. *Id.*

25. Upon request and payment of estimated costs, U S WEST will perform field verification of space along the requested route. USW-18, p. 42. Field verification for duct lease requests includes the identification of all conduits and ducts that enter each wall of each manhole. *Id.* The field verification also allows for the identification of any make-ready work. USW-18, p. 42. The field verification for pole attachments includes the physical inspection of all poles along the requested route for available space to attach and the identification of clearance requirements and any required modifications or make ready work that is necessary to add additional attachments. USW-18, p.42. Field verification is completed within 35 days for standard requests. USW-18, p. 42. Upon completion of the field verification process, a response is provided to the CLEC concerning duct/pole availability and estimated cost quote for any required modifications/make ready work. USW-18, p. 42. This whole process up to the point of negotiating a contract takes 45 days. *Id.* Upon acceptance of the quote, U S WEST and the CLEC will enter into an appropriate contract. *Id.*

26. U S WEST states that it will not discriminate in favor of itself; that its denial will be in writing with the reasons enumerated. USW-18, p. 42. In all cases, U S WEST commits to take reasonable steps to accommodate access. USW-18, p. 43. U S WEST also states that it meets all of the other requirements set out in the FCC's First Report and Order. *Id.* See Finding of Fact 12 above.

27. In addition, U S WEST states that it complies with the FCC's requirements set out in the *BellSouth Louisiana II Order*. Specifically, U S WEST states that it provides nondiscriminatory access to information. *Id.* U S WEST has committed to provide nondiscriminatory access to "maps and similar records" within a reasonable time through the bona fide request process or various interconnection agreements in Arizona, which U S WEST states is substantially the same process as that approved by the FCC in the *BellSouth Louisiana II Order*.

28. CLECs may also use workers of their choice, which U S WEST states meets the requirements set out by the FCC in the *BellSouth Louisiana II Order*. Section 10.8.2.16 of the original SGAT states:

"CLEC may use individual workers of its choice to perform any work necessary for the attaching of its facilities so long as such workers have the same qualifications and training as U S WEST's workers. CLEC may use any contractor approved by U S WEST to perform Make-Ready Work."

29. Finally, U S WEST states that its SGAT rates comply with all State and Federal laws including Section 224, and all applicable FCC rules and Commission rules. The rate elements associated with providing access to poles, ducts, conduits and rights-

of-way allow U S WEST to recover its costs, both recurring and nonrecurring, associated with providing pole and conduit space. USW-18 at p. 45. U S WEST quotes to the attaching party the following fees per Section 10.8.3 of the SGAT: Inquiry Fee, Field Verification Fee, required Make-Ready/Modification Work and Annual Usage.

30. In the last two years U S WEST received nine requests for access to poles and 13 requests for access to ducts, and no requests for access to rights-of-way. 2/7/00 Tr. at p. 22. The amount of duct available and being used by telecommunications carriers in Arizona is approximately 1,075,339 feet. However, U S WEST has had no requests for reservations of duct in Arizona. 2/7/00 Tr. at p. 22. One request for access to poles resulted in an attachment to 29 U S WEST poles. As of February, 2000, U S WEST provided in excess of 71,000 pole attachments in Arizona. 2/7/00 TR. at p. 22. Three requests for pole access were declined. USW-18, p. 46. One CLEC leases 351 feet of duct for a highway crossing. USW-18, p. 46. Six requests for duct were declined after the record review process. No CLEC has requested access to rights of way. USW-18, p. 46.

#### **d. Competitor's Position**

31. In their July 22, 1999, preliminary Statements of Position on U S WEST's compliance with all Checklist Items, AT&T stated that U S WEST, in new tariff filings, has attempted to gain access to Multiple Dwelling Units (MDUs), malls, and other campus type developments which may prevent CLECs from having nondiscriminatory access to poles, conduits and rights-of-way controlled by U S WEST. AT&T Ex. p. 8. Cox stated that U S WEST is not in compliance with this Checklist Item citing refusal of U S WEST to provide proper demarcation points to multi-tenant buildings, thus creating situations where Cox does not have the same access to the rights-of-way to the building as U S WEST. Cox also stated that U S WEST persists in submitting tariffs that result in the exclusion of CLECs from multi-tenant buildings (and related rights-of-way), such as the pending Construction Charge Tariff (Docket No. T-01051B-99-0272) and Tenant Solutions Tariff (Docket No. T-01051B-99-0450).

32. Other CLECs filing comments on July 22, 1999, included Sprint, MCIW, NEXTLINK Arizona, L.L.C ("NEXTLINK"), ELI, e-spire, and Rhythms. ELI stated it joined in the position statements filed by the other CLECs. e-spire stated that U S WEST does not pay the same city and county franchise fees that e-spire is required to pay in Tucson and Pima County. Also, U S WEST has sought approval of tariffs that could act to exclude CLECs from U S WEST's rights-of-way to multi-tenant environments. MCIW stated that it currently had no information associated with non-discriminatory access to poles, conduits and rights-of-way owned and controlled by U S WEST to suggest U S WEST is or is not in compliance with this Checklist Item. Rhythms did not offer a Statement of Position on Checklist Item No. 3. Sprint stated that it could not comment on U S WEST's claim of meeting the requirement of this Checklist Item since Sprint has not yet attempted access to U S WEST's poles, ducts or conduits in Arizona. NEXTLINK stated that its experience in Arizona is that U S WEST fails to provide timely or adequate

access to conduits or rights of way. U S WEST also charges excessive rates when it offers such access.

33. AT&T filed additional comments on Checklist Items 3 and 13 on February 10, 2000. MCIW filed its additional comments on Checklist Items 3 and 13 on February 8, 2000. COX filed additional comments on Checklist Item 3 on February 10, 2000.

34. AT&T had numerous concerns relating to the language contained in U S WEST's SGAT. According to AT&T's comments, U S WEST does not provide sufficient information regarding the terms and conditions under which it intends to offer access to poles, ducts and rights-of-way for a determination to be made that it complies with Checklist Item 3. A&T Ex. 10, at p. 4.

35. U S WEST's SGAT is particularly silent on the terms and conditions on which it will offer access to rights-of-way. *Id.* There is no affirmative statement that access to all rights-of-way, whether on public property, private property or owned property, that is *owned or controlled* by U S WEST, will be made available to CLECs. AT&T Ex. 10, at pps. 6-7. 38. In addition, the SGAT does not provide for "access to and use of poles, ducts and rights-of-way to the same extent and for the same purpose as U S WEST may access or use such poles, ducts and rights-of-way, as is required by the FCC." AT&T Ex. 10, at p. 5. There is also nothing about access to Multiple Dwelling Units ("MDUs") and other multiple tenant environments. *Id.* at pps. 6-7. The SGAT is also silent on the availability of space to CLECs on rooftops of U S WEST buildings and public and private buildings where U S WEST has access. *Id.* at p. 7. Further, according to AT&T, the SGAT contains no provisions setting forth a process for CLECs to apply for or to order rights-of-way. *Id.* at p. 7.

36. AT&T also had concerns with SGAT Section 10.8.4.6 which AT&T states "fails to acknowledge that U S WEST may only deny a request for access for reasons of safety, reliability and generally applicable engineering purposes, provided these principles are applied in a nondiscriminatory manner." AT&T Ex. 10, at p. 5. AT&T states that the lack of capacity does not automatically entitle U S WEST to deny a request for access. *Id.*

37. In addition, AT&T pointed out that the SGAT, Section 10.8.2 provided that nondiscriminatory access would be provided to CLECs with reference to the terms and conditions contained in a document entitled "U S WEST Pole and Attachments and/or Innerduct Occupancy General Terms and Conditions", yet U S WEST did not provide this document for review. AT&T Ex. 10, at p. 4.

38. The SGAT is silent on when and how U S WEST will reserve space for itself. AT&T Ex. 10 at p. 5. U S WEST's SGAT is also unclear as to the modification costs that CLECs will be required to pay. *Id.*

39. Further, there are no assurances contained in SGAT Section 10.8.2.17 that U S WEST will not use the contractor approval process to discriminate against competitors by delaying their ability to commence facilities work. AT&T Ex. 10 at p. 6.

40. AT&T also expressed concern that SGAT Section 10.8.2.19 seems to require CLECs to give up the use of rights-of-way when U S WEST decides to abandon or sell it. AT&T Ex. 10 at p. 7. If U S WEST sells poles or innerduct to another party, this paragraph would appear to preclude the CLECs rights for existing use. *Id.* This could be very expensive for the CLECs and potentially disruptive to existing service, and violates the Act. AT&T Ex. 10 at p. 7.

41. Finally, AT&T states that it has experienced problems with U S WEST in the provisioning of new access lines to MDUs and to some campus type business arrangements using AT&T's Hybrid Fiber Coax facilities to supply local service. AT&T Ex. 10 at p. 7. AT&T also claimed that U S WEST is misusing proprietary information, obtained from AT&T in the course of AT&T's ordering of access and number portability, to alert sales and marketing teams of potential customer losses in these locations. AT&T Ex. 10 at p. 8.

42. MCIW agreed with AT&T that SGAT Section 10.8.1 needed modification to require U S WEST to provide access to its rights-of-way. MCIW Ex. 1 at p. 2. MCIW also said it was necessary to have a complete description of the rights-of-way U S WEST will offer to CLECs. MCIW Ex. 1 at p. 2.

43. MCIW stated that where U S WEST has spare conduit, CLECs should be permitted to place fiber and not copper. *Id.* at p. 2. MCIW also stated that CLECs should also have the right to fill conduit with innerduct. *Id.* at p. 2.

44. Consistent with AT&T's comments, MCIW requested that U S WEST make available its Pole Attachment and/or Innerduct Occupancy General Terms and Conditions which were referenced in SGAT Section 10.8.2 to parties for review. *Id.* at p. 2.

45. Other specific language changes to the SGAT recommended by MCIW included the following:

- a) Section 10.8.2.1 should allow CLECs the right to use their own contractors provided they are qualified.
- b) Section 10.8.2.10 should be clarified with regard to the apportionment of modification costs.
- c) Section 10.8.2.13 should contain standard cure language.<sup>6</sup>
- d) Section 10.8.2.18 should be modified to provide that if a CLEC terminates it should get a pro rata portion of its money back.

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<sup>6</sup> MCIW proposed the following standard cure language: "provided, however, if the conditions cannot be physically cured within such specified time and a CLEC is diligently pursuing such a cure, the CLEC shall be granted additional time to complete such cure."

- e) Section 10.8.2.19 allows U S WEST to sell its rights-of-way and terminate a CLEC's lease/license. This is inappropriate.
- d) Sections 10.8.3.1, 2 and 3, should be modified to provide that if prepaid charges exceed the actual cost incurred by U S WEST, the difference should be refunded to the CLEC.
- f) Section 10.8.4.5 should be modified to require U S WEST to notify a CLEC if the cost exceeds 10% of the estimate.
- g) Section 10.8.4.6 should recognize that the reservation fee should be credited against the attachment or occupancy fee if the CLEC attaches or occupies.
- h) Section 10.8.4.6.2 should be amended to make clear when U S WEST intends to grant the license (before or after the completion of make-ready work).

MCIW Ex. 1 at pps. 3-4.

46. Finally, MCIW stated that CLECs should not be required to pay any fees in advance but that if that is required, the CLECs should be permitted to pay those fees at the first and middle of the year. MCIW Ex. 1, at p. 4

47. Cox, in its comments, stated that it has experienced problems with U S WEST at multi-dwelling unit facilities such as apartment complexes, where the demarcation point between U S WEST's network and the MDUs' inside wiring is located in the interior of the MDU property, not at the edge of the property. Cox Ex. 1 at p. 1. In these cases U S WEST has access to and controls a right-of-way easement on the MDU property between the property line and the demarcation point. Cox states that any CLEC seeking to serve the MDU needs similar access, and that unless the MDU owner agrees to grant the CLEC separate right-of-way access, the CLEC must use U S WEST's right-of-way to the demarcation point. Cox Ex. 1 at p. 1. Cox states that more often than not the only effective access to the right-of-way is through U S WEST's cable/wire facilities because the MDU owner does not want to have additional trenching in the U S WEST right-of-way. *Id.* at p. 2.

48. Cox also states that U S WEST's tariff Section 2.8.B.2 permits U S WEST to effectively prevent CLECs from gaining access to rights-of-way easements housing the cross-connects necessary to serve the individual residents within the MDUs. *Id.* at p. 2. Cox states that the problems have been exacerbated by U S WEST's recently amended Construction Charge tariff that allows U S WEST to waive construction charges in connecting MDUs to U S WEST's networks. Cox Ex. 1 at p. 3.

49. Cox also states that U S WEST's rates for wiring from a point near the MDU property line to the property owner's CCB (typically only a few hundred feet of the loop) are not just and reasonable. *Id.* at p. 3. Cox states that U S WEST is attempting to charge a cost of \$15.33 per month per access line, which is approximately 70% of the \$21.98 loop rate in Arizona. *Id.* at p. 3. Cox states that \$15.33 is the rate for the entire loop distribution segment which is far more than Cox needs for access. *Id.* at p. 3.

50. On March 2, 2000, AT&T filed supplemental comments regarding Checklist Items 3, 7, 10 and 13. While many of the issues raised by AT&T were no longer in dispute regarding this specific Checklist Item, AT&T still had some concerns with the following issues: 1) Rights-of-Way, 2) MDU and Rooftop Access, 3) Costs of Modifications, 4) Innerduct and 5) Splices in Central Office Manholes. AT&T Ex. 11 at p. 5 - 7.

51. On February 29, 2000, MCIW filed additional comments addressing Checklist Items 3 and 13. Specifically, MCIW still had problems with the language language contained in certain sections of U S WEST's SGAT.

52. On March 1, 2000, Cox docketed a letter indicating that it did not have additional comments on Checklist Items 3, 7, 10 and 13. Cox went on to state that it does not believe the issues raised by its comments filed February 10, 2000 were resolved except that the subloop issue was deferred to Checklist Item 2.

53. At the 2/7/00 hearing, Cox witness Smith expanded on Cox's position that Cox is trying to gain access to MDU properties and Cox can provide service using its own facilities, if it had access to the conduits and easements on some of those properties, some of which are controlled by U S WEST. Id. at pps. 42-43. However, many property owners will not permit Cox to overbuild their properties, retrench, and dig up streets. Id. at p. 43. As a result Cox is trying to work with U S WEST to gain access to basically the last couple hundred feet of the loop in order to get from the street where its facilities are located to the demarcation points which are typically buried deep in the properties on each building. Id. at p. 43.

54. In addition, Cox raised concerns about the unreasonable prices quoted by U S WEST which essentially required Cox to pay 70 percent of the full cost of the loop when Cox only needed some minimal fraction of the end of that loop. 2/7/00 TR. at p. 43. In addition, Cox stated that it believes U S WEST is using a combination of techniques to "effectively prevent competitive carriers from gaining access to multi-tenant properties." Id. at p. 43. Cox states that Section 10.8.2.8 of the SGAT requires CLECs to get permission from MDU owners or property owners in order to avail themselves of the provisions in the SGAT, but under the Company's construction charge tariffs, which permits U S WEST to waive the cost of building facilities on the properties if the owner agrees to allow U S WEST to serve approximately 80% of the subscribers, that the property owners have an extremely strong motivation to deny access to any other carriers from serving those properties. Id. at p. 44.

55. Cox also raised an additional concern with U S WEST's tariff, section 2.8, para. B, subparagraph 2, that access to the Company's facilities on the Company side of the demarcation point was prohibited. 2/7/00 TR. at pp. 45-46. Cox believes that this provision effectively prevents competitors from gaining access to the building owner's facilities that are typically located in close proximity to the U S WEST demarcation point. 2/7/00 TR. at p. 46. There is a utility closet where the U S WEST facilities

terminate and a cross connect device where U S WEST runs its cables, its jumpers to the inside wire or the campus wiring of the property owner. If U S WEST prohibits access to that location, competitors and in many cases the property owner can't get access to the terminating wire on the campus. *Id.* at p. 46. 59. Cox asked for a provision requiring customers or building owners to allow access to other CLECs. *Id.* at p. 83.

56. At the February 7, 2000 hearing, AT&T agreed to defer the issue on access to rooftops as it relates to collocation or interconnection to Checklist Item 1. *Id.* at p. 89.

57. AT&T proposed two additional changes to be discussed at the final Workshop in March. First, it asked that Section 10.8.2.6 of the SGAT be modified so that U S WEST would "control" rather than "own" the CLEC innerduct until the CLEC terminates its use of the innerduct, or abandons or fails to remove the innerduct in a specified period of time at which time ownership would pass to U S WEST. AT&T-11, p. 7. Additionally, AT&T proposed that U S WEST must allow CLECs to splice in the central office manhole on a nondiscriminatory basis. *Id.*

#### **e. U S WEST Response**

58. In its February 16, 2000 written response, U S WEST addressed several of AT&T and MCIW's concerns. U S WEST modified its SGAT to include language specifically providing for "access" to rights-of-way. USW Ex. 19, at p. 4. U S WEST revised the SGAT to address MCI's concern regarding innerduct, however it made clear that the ownership of such innerduct vests in U S WEST. USW Ex. 19 at p. 6. AT&T's concerns regarding CLECs workers were addressed by U S WEST by incorporating Section 224 and its progeny into the SGAT. USW Ex. 19, p. 7. U S WEST made changes to the SGAT to address MCIW and AT&T's concerns regarding the U S WEST Pole Attachment and/or Innerduct Occupancy General Terms and Conditions, by incorporating the document as an exhibit to the SGAT. USW Ex. p. 7. U S WEST also made changes to the SGAT to address MCI and AT&T's concerns regarding the cost of modifications. USW Ex. 19 at p. 7.

59. U S WEST also revised its SGAT language to address MCI and AT&T's desire to have CLEC access rights survive a sale. USW Ex. 19 at p. 8. U S WEST revised its SGAT language to accommodate MCIW's demand for a true-up to the extent U S WEST believed it was consistent with governing law. *Id.* at p. 8. U S WEST made this change to the provisions regarding make-ready work, but only to the extent that true-ups are actually requested. USW-19 at p. 8. U S WEST did not provide for true-ups of inquiry fees and field verification fees because the FCC approved of the use of "standard quotes" for these items. *Id.* at p. 8. While stating it had no basis in law, U S WEST agreed to accommodate MCIW's request for a refund if its application was denied by U S WEST. USW-19 at p. 8. The refunds will, however, not be automatic but by request. USW-19 at p. 8. Finally, U S WEST agreed to accommodate AT&T's concerns regarding denials for lack of capacity and reservations by incorporating Section 224 and its progeny into relevant provisions of the SGAT. *Id.* at p. 10.



60. In its February 16, 2000 response, U S WEST stated that it believed several of the CLEC requested changes were not required under existing laws and therefore it would not agree to them. See USW Ex. 19, p. 5 et seq. For instance, U S WEST stated that AT&T and Cox's request for MDU access is not contemplated under governing law. *Id.* at p. 5. U S WEST went on to state that MDU access is not a matter of U S WEST rights-of-way, it is a matter of property owned by a third party who controls whether or not to grant access. *Id.* at p. 5. In support of its position, U S WEST cited to the Local Competition Order wherein the FCC stated that the access obligations of Section 224(f) applied when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access. *Id.* at p. 5

61. U S WEST refused to revise the SGAT to allow for a refund if the CLEC canceled for any reason as requested by MCIW. *Id.* at p.7. U S WEST did not agree to MCIW's request that U S WEST pay for cost overruns of less than 10% stating that such a policy would discriminate against U S WEST. *Id.* at p. 8. U S WEST rejected MCIW's proposal that U S WEST credit the reservation fee against the access fee if the CLEC eventually uses the space. USW-19 at p. 9. U S WEST stated that the FCC has allowed the ILEC to recover its opportunity cost which is the purpose of the reservation fee. *Id.* at p. 9. U S WEST also rejected MCIW's proposed change that the access fee start only after completion of the make-ready work. USW-19 at p. 9. Existing interconnection agreements require payment of access upon the expiration of a reservation or upon exercise of a right of first refusal, whichever occurs first. USW-19 at p. 9. U S WEST also refused to make AT&T and MCIW's requested change for the ability to make splices in the central office manhole. *Id.* at pps. 9-10. Finally, U S WEST refused to make MCIW's requested change to expand its time to cure unauthorized attachments. *Id.* at p. 11.

62. U S WEST presented evidence that current policies are not operating to preclude CLECs from entry into the MDU market. 2/7/00 TR. at p. 48. In 1999, U S WEST reports that CLECs won 66% of MDUs, or 7,652 units. 2/7/00 TR. at p. 48. U S WEST also stated that CLECs use the same type of marginal exclusivity provisions that U S WEST uses. *Id.* at p. 49.

63. U S WEST also referred to the FCC's rules contained in 47 C.F.R. Section 68.3 which provide that if a telephone company does not elect to establish a practice of placing the demarcation point at the property line, the multi-unit premises owner will determine the location of the demarcation point. *Id.* at p. 49. U S WEST states that this is exactly what its wire and cable termination policy provides. *Id.* U S WEST does not have a policy of the MPOE at the property line as being the only demarcation point. *Id.* U S WEST gives property owners four options: 1) one demarcation point per building, 2) more than one demarcation point per building, 3) one demarcation point per unit, or 4) the property line as the demarcation point. *Id.* at pp. 49-50.

64. U S WEST further stated that it would lease the portion of the wire running from the MPOE to the building. *Id.* at p. 55. In response to Cox's pricing

concerns, U S WEST stated that it intends to charge the rates that have been approved by the Commission for the distribution facilities. *Id.* at p. 55. U S WEST indicated that if evidence was presented that another price may be more appropriate, U S WEST may consider it. *Id.*

65. U S WEST stated at the Workshop that if it owns and controls the conduit into the building and demarcation point that is in the building, it will give the CLECs access if space in the conduit is available. *Id.* at pps. 65-66. U S WEST also stated that it was not aware of a situation where the CLEC could not get access through the subloop or wiring directly to the demarc if they can get the property owner to agree to it or if there's space in the conduit they couldn't run their facilities through the conduit and that its contracts did not prohibit this. *Id.* at p. 67.

66. At the 2/7/00 Workshop, U S WEST agreed to several other terms and conditions suggested by the CLECs. It agreed to include a provision that its approval of CLEC contractors would not be unreasonably withheld. *Id.* at pp. 103-104. U S WEST reiterated its consent to attach its standard occupancy agreement as an attachment to its SGAT. *Id.* at p. 109. U S WEST also agreed to add language to Section 10.8.2.10 to indicate that governmentally-mandated changes to poles, ducts, conduit and rights-of-way are not the responsibility of parties sharing the poles, ducts, conduit and rights-of-way with U S WEST. *TR.* at p. 108.

67. At the February 17, 2000 Workshop, the issue of CLECs providing reciprocal access to U S WEST to their poles, ducts and conduits was also discussed and the fact that the issue was now before the Ninth Circuit of Appeals. Reciprocity is currently required under existing interconnection agreements and the Commission's decision on this issue was recently affirmed by the Federal District Court for the District of Arizona.<sup>7</sup> U S WEST agreed with AT&T that if reciprocal access is upheld, that the other provisions regarding ownership, etc. should be reciprocal also. 2/7/00 *TR.* at pp. 32-24. However, U S WEST and the CLECs agreed that the reciprocity provisions would all be subject to the outcome of appeals now pending before the Ninth Circuit Court of Appeals.

68. At the 2/7/00 Workshop, U S WEST also agreed that to the extent they have rights-of-way to get to the rooftops, under the FCC rules and Section 224, CLECs are entitled to those same rights. *Id.* at pp. 89-90.

69. U S WEST also agreed to AT&T's request to modify Section 10.8.2.6 of the SGAT so that U S WEST would "control" rather than "own" the CLEC innerduct until the CLEC terminates its use of the innerduct, or abandons or fails to remove the innerduct in a specified period of time at which time ownership would pass to U S WEST. 3/7/00 *TR.* at pps. 111-130. It also addressed AT&T and MCIW's concerns regarding splices in manholes. It was agreed that there would be a presumption that no fiber splices

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<sup>7</sup>*U S WEST Communications v. Jennings et al.*, 46 F. Supp.2d 1004 (D.Ariz., May 4, 1999).

would be allowed; but both the CLECs and U S WEST would be allowed to do copper splices on a nondiscriminatory basis. *Id.* at pp. 128-129.

70. Additional negotiations ensued between the parties subsequent to the March 7, 2000 Workshop. On June 12, 2000, Steven R. Beck, Attorney for U S WEST, submitted a letter to Staff along with a copy of revisions to the SGAT and two of its exhibits which had been agreed to by the parties. By letter dated June 15, 2000, Richard S. Wolters, Attorney for AT&T, responded that AT&T had no objections to those changes.

### **e. Verification of Compliance**

71. At the February 17, 2000 and March 7, 2000 Workshops, Checklist Item 3 issues were discussed at length among the parties. The parties were able to resolve almost all of their remaining disputes at the Workshops. Further negotiations continued between U S WEST and MCIWorldCom resulting in an additional filing by U W WEST on June 12, 2000. The revisions contained final revised versions of Section 10.8, Exhibit A and Exhibit D of the SGAT. In its letter, U S WEST stated that all parties had agreed to the changes to SGAT Section 10.8. The changes to Exhibits A and D of the SGAT were agreed to in the Workshops and also subsequently negotiated between MCIWorldCom and U S WEST. No party registered any objection to the changes.

72. The main issue in dispute between the parties involved access to MDUs. While the issue was never resolved to everyone's satisfaction, U S WEST pointed out that this issue was treated as a Checklist Item 2 issue in other States. U S WEST pointed out that Cox had never raised this issue in Nebraska as a Checklist Item 3 issue. 2/7/00 TR. at p. 41. U S WEST stated that Cox had raised this as an interconnection and subloop issue in Nebraska. 2/7/00 TR. at p. 41. U S WEST further stated that the issue is really a subloop issue, that is, where can the CLEC get access. *Id.*

73. Based upon this discussion, Cox and the other parties agreed to defer the subloop issue and the pricing issue it raised to Checklist Item 2. 2/7/00 TR. at p. 77. Thus, all issues regarding access to MDUs have been deferred to Checklist Item 2. *Id.*

74. With the compromises reached between the parties and the agreement to address MDUs as part of Checklist Item 2, U S WEST meets the requirements of Checklist Item 3. U S WEST complies with the requirements of the *Local Competition First Report and Order* in that it offers access on a nondiscriminatory basis to the poles, ducts, conduits and rights-of-way which it controls or owns. The rates, terms and conditions charged by U S WEST will be applied in a uniform manner to all telecommunications carriers that have or seek access. U S WEST states that its rates also comply with the Pole Attachment Telecommunications Rate Order.

75. U S WEST also complies with the additional requirements established by the FCC in its *BellSouth Louisiana II Order*. It is clear that it will be evaluating facility

requests pursuant to Section 224 of the Act and the *Local Competition Orders*. It also has instituted processes to give competitors nondiscriminatory access to information and facilities availability. It has also put in place policies and provisions in its SGAT which permit competitors to use non-RBOC workers.

76. Finally, there appear to be no outstanding issues between the parties that cannot be addressed in Workshops on U S WEST's compliance with Checklist Item 2. Cox's concerns on MDUs will be adequately addressed in these Workshops.

## **II. CONCLUSIONS OF LAW**

1. 47 U.S.C. Section 271 contains the general terms and conditions for BOC entry into the interLATA market.

2. U S WEST is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. Sections 40-281 and 40-282 and the Arizona Commission has jurisdiction over U S WEST.

3. U S WEST is a Bell Operating Company as defined in 47 U.S.C. Section 153 and currently may only provide interLATA services originating in any of its in-region States (as defined in subsection (I)) if the FCC approves the application under 47 U.S.C. Section 271(d)(3).

4. The Arizona Commission is a "State commission" as that term is defined in 47 U.S.C. Section 153(41).

5. Pursuant to 47 U.S.C. Section 271(d)(2)(B), before making any determination under this subsection, the FCC is required to consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).

6. In order to obtain Section 271 authorization, U S WEST must, inter alia, meet the requirements of Section 271(c)(2)(B), the Competitive Checklist.

7. Checklist Item No. 3 requires U S WEST to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."

8. Based upon the testimony, comment and exhibits submitted, U S WEST meets the requirements of Checklist Item No. 3, U S WEST's provision of access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224 is no longer subject to dispute.

9 U S WEST's compliance with Checklist Item No. 3 is undisputed.